

# RESERVED WATER RIGHTS COMPACT COMMISSION



*Kennedy Creek Camp, Milk River Project, in 1913*



*Horse Teams Hauling the St. Mary Siphon*

HISTORIC PHOTOS BY U. S. BUREAU OF RECLAMATION

# RESERVED WATER RIGHTS COMPACT COMMISSION

*Working to “conclude compacts for the equitable division and apportionment of waters between the State and its people and the several Indian Tribes claiming reserved water rights within the state” (MCA 85-2-701) and “between the State and its people and the federal government claiming non-Indian reserved waters within the state” (MCA 85-2-703).*

The Montana Legislature created the Reserved Water Rights Compact Commission (RWRCC) in 1979, the same year that it created the Montana Water Court. The purpose of the commission is to negotiate, on behalf of the State of Montana, with Indian Tribes and federal agencies claiming federal reserved water rights in the state. While they are being negotiated, the claims of the Tribes and federal agencies are suspended from adjudication in the Water Court. After being submitted for public comment in the specific area impacted, a negotiated settlement must be ratified by the Montana Legislature and the Tribal Council (in the case of Indian reserved rights) and approved by the appropriate federal authorities.

Montana was one of the first states to conduct such negotiations, and it is still the only state to do so using a commission. RWRCC is supported by a nine-member staff.

## The Compact Commission

The Reserved Water Rights Compact Commission is made up of nine members who serve for four-year terms. One member is appointed by the Attorney General's Office, four by the Governor's Office, two by the Speaker of the House, and two by the President of the Senate. Current RWRCC members are:

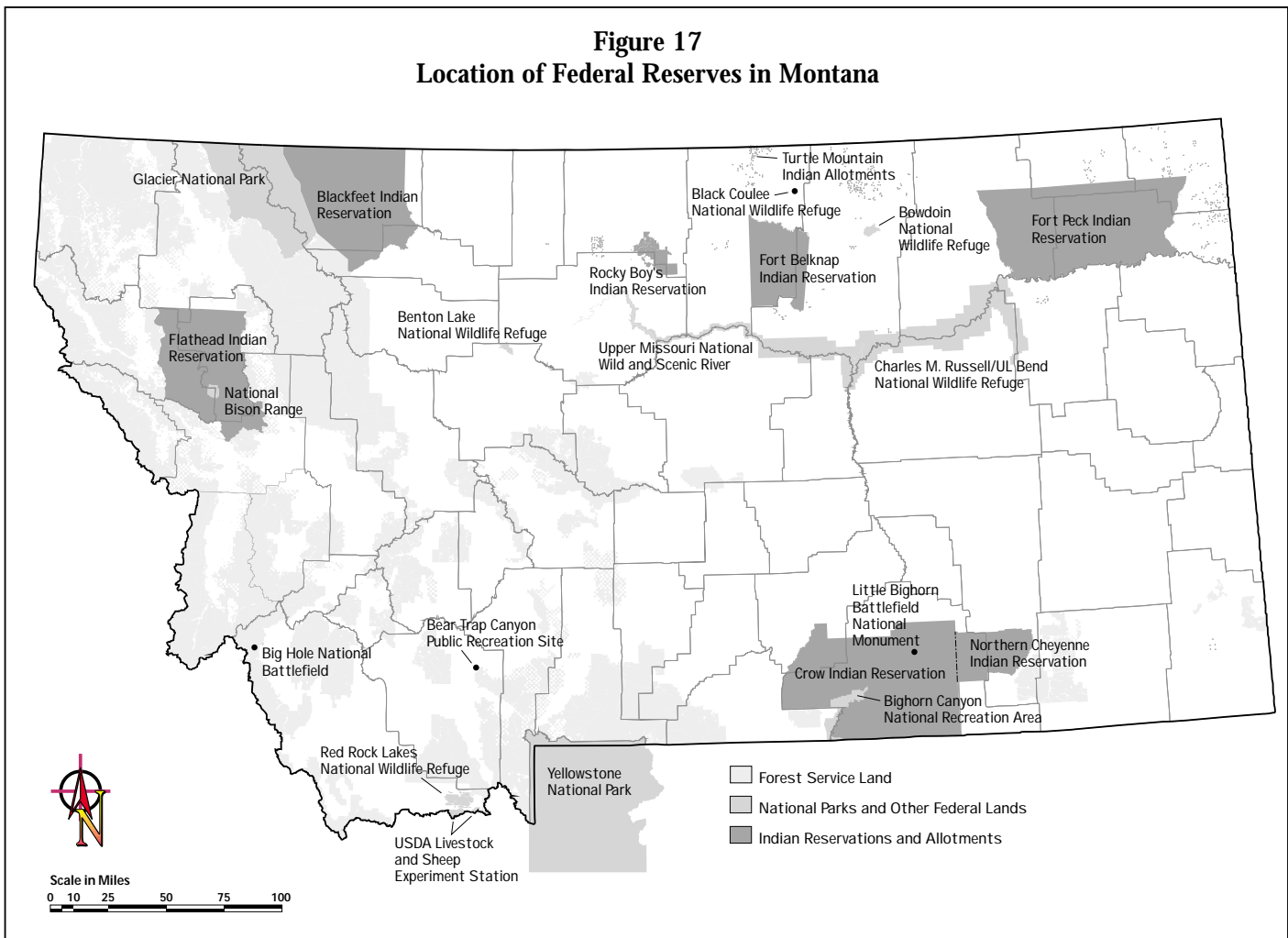
<b>Chris Tweeten, Chair</b> <b>Helena</b> <b>Chief Civil Counsel, Attorney General's Office</b>	
<b>Tara DePuy</b> <b>Livingston</b> <b>Park County Attorney</b>	<b>Rep. Gary Forrester</b> <b>Billings</b> <b>Contractor</b>
<b>Gene Etchart</b> <b>Glasgow</b> <b>Rancher</b>	<b>Rep. Cindy Younkin, Vice Chair</b> <b>Bozeman</b> <b>Attorney</b>
<b>Lorents Grosfield</b> <b>Big Timber</b> <b>Rancher</b>	<b>Sen. Bea McCarthy</b> <b>Anaconda</b> <b>Teacher</b>
<b>Steve Hughes</b> <b>Polson</b> <b>Rancher</b>	<b>Sen. Bill Tash</b> <b>Dillon</b> <b>Agriculture/Rancher</b>

## Federal Reserved Water Rights

A federal reserved water right is a right to water that was created when Congress or the president of the United States reserved land out of the public domain. Federal reserves in Montana are shown in Figure 17. The U. S. Supreme Court has ruled that enough water be reserved to meet the purposes for which the reserved lands were designated.

The date that the land was withdrawn and the reservation created is the priority date of a federal reserved water right. Reserved water rights for Indian reservations, for instance, go back to the 1800s. Federal reserved water rights do not have the same restrictions placed on them as on state appropriative rights. For example, a notice of appropriation or a beneficial use is not required to maintain a federal reserved right, and it is not lost due to non-use.

**Figure 17**  
**Location of Federal Reserves in Montana**



## Completed Compacts

The commission has completed the 10 compacts listed in Table 22.

<b>Table 22</b> <b>Compacts Concluded by the</b> <b>Reserved Water Rights Compact Commission</b>		
<b>Compact</b>	<b>Date</b>	<b>Comments</b>
Assiniboine and Sioux Tribes of the Fort Peck Indian Reservation  MCA 85-20-201	May 1985	This compact contains a provision for water marketing by the Tribes, making federal legislation necessary. That federal legislation has not yet passed. This compact has been approved by the Montana Water Court.
Northern Cheyenne Tribe  MCA 85-20-301                      PL 102-374	April 1991	Included in the compact was a requirement that the federal government and the State of Montana contribute funds to repair and enlarge the unsafe Tongue River Dam, which has been completed. The compact was approved by Congress and signed by the president in 1992. This compact has been approved by the Montana Water Court.
U.S. National Park Service Yellowstone National Park Glacier National Park Big Hole National Battlefield  MCA 85-20-401	January 1994	This compact includes an article providing a controlled groundwater area to protect the hydrothermal system in Yellowstone National Park. It is now in the final stage of the Montana Water Court approval process.
U.S. National Park Service Little Bighorn Battlefield National Monument Bighorn Canyon National Recreation Area  MCA 85-20-401	May 1995	Codified with the first compact with the National Park Service (above), this compact is in the final stage of the Montana Water Court approval process.
U.S. Bureau of Land Management (BLM) Wild and Scenic Missouri River Bear Trap Canyon, Madison River  MCA 85-20-501	March 1997	This compact settles the instream flow rights for two river segments. It has received final approval from BLM management and the U.S. Department of Justice. It will be submitted to the Montana Water Court.
U.S. Fish and Wildlife Service (FWS) Benton Lake National Wildlife Refuge Black Coulee National Wildlife Refuge  MCA 85-20-701	March 1997	This compact settles the reserved water rights for two of the six national wildlife refuges. It has been approved by FWS and the U.S. Department of Justice. The Benton Lake Compact and Black Coulee Compact have been submitted to the Montana Water Court.
Chippewa Cree Tribe of the Rocky Boy's Indian Reservation  MCA 85-20-601                      PL 106-163	April 1997	This compact allocates 10,000 acre-feet per year (AFY) to the Tribe from water arising on the reservation. The federal authorization includes 10,000 AFY from water stored in Tiber Reservoir. The compact was approved by Congress and signed by the president in 1999. It has been approved by the Montana Water Court.

(Continued on page 78)

**Table 22**  
**Compacts Concluded by the**  
**Reserved Water Rights Compact Commission**  
*(Continued from page 77)*

Compact	Date	Comments
U.S. Fish and Wildlife Service (FWS) Red Rock Lakes National Wildlife Refuge  MCA 85-20-801	April 1999	This compact settles the reserved water rights for another of the six national wildlife refuges for which federal reserved rights are claimed in Montana. The Red Rock Lakes settlement has been ratified by the legislature and approved by appropriate federal agencies. It is in the final stages of the Montana Water Court approval process.
Crow Tribe          MCA 85-20-901	June 1999 Special Legislative Session	This compact allocates 500,000 acre-feet per year (AFY) of the natural flow of the Bighorn River to the Crow Tribe. The U. S. Bureau of Reclamation will allocate 300,000 AFY of storage in Bighorn Lake to the Tribe. On the area north of the reservation known as the "Ceded Strip," the Tribe has the right to use 47,000 AFY from any water source on any lands acquired and held in trust for the Tribe. The compact provides protection for all current state and Tribal water users in the affected water basins. It authorizes the state to pay the Crow Tribe \$15 million in exchange for the Tribe's dismissal of a coal severance tax lawsuit and for the state's portion of the cost-share for the water rights settlement. A Streamflow and Lake Level Management Plan for Bighorn River and Lake was negotiated and finalized by the parties in 2000, as required by the compact. The compact must go to Congress for approval, and it must pass a Crow Tribal referendum vote. A Memorandum of Understanding dated June 9, 2003, which was signed by the Tribal chairman and the governor, in essence extends compact time lines for Congressional action.
Gros Ventre and Assiniboine Tribes of the Fort Belknap Indian Reservation          MCA 85-20-1001	April 2001	Following almost 15 years of negotiations and technical work, the compact negotiated between the State of Montana and the Fort Belknap Indian Community was preliminarily approved by the Fort Belknap Community Council, passed the Montana Legislature, and was signed by the governor in April 2001. This compact allocates 645 cubic feet per second (cfs) from the Milk River to the Tribes, limited by the United States' share of the natural flow of the Milk River and the Tribal capacity to develop the water. It also quantifies the Tribal water rights in Peoples Creek, Beaver Creek, and Missouri River Basin 40EJ. When uses upstream of the reservation interfere with the Tribal water right, the Tribes will obtain water from the federal Milk River Irrigation Project. The parties are currently negotiating the funding and mitigation measures to implement the compact that will be in the federal legislation ratifying the compact.

## Current Negotiations

Commission members and staff have been concentrating on negotiations concerning two Indian reservations and two federal agencies.

### Indian

#### **Blackfeet Tribe of the Blackfeet Reservation**

In the early 1990s, the Blackfeet Tribe chose to litigate rather than negotiate. In November 1997, the Tribal chair informed the commission that the Tribe proposed to resume negotiations and presented a proposal for settlement. A stay of litigation was requested and was entered by the Montana Water Court in December 1997. In January 1998, an initial negotiating session was held. The commission accepted the Tribe's request to resume negotiations, and negotiating sessions and staff meetings were subsequently held.

In Fiscal Year 2004, legal and technical staff continued to evaluate a Tribal proposal for the settlement of water rights to Birch Creek, the southern boundary of the reservation. The Tribe has also been involved in the St. Mary's Working Group, which is exploring the rehabilitation of the St. Mary diversion facilities, a major project of the U. S. Bureau of Reclamation (BOR). Settling the Tribe's water rights to the Milk and St. Mary rivers will be an important component of this effort.

#### **Confederated Salish and Kootenai Tribes of the Flathead Reservation**

Following presentation of the Tribes' settlement proposal in June 2001, the parties agreed to establish three working groups: administrative, technical, and claims examination. The Montana Water Court has approved a request to commence claims examination in the Jocko Basin on the reservation. In Fiscal Year 2004, the parties continued their efforts to reach agreement on an interim plan for water management on the reservation, pending a final compact. There have been no recent negotiations on the long-term settlement. The parties continue to discuss the possible use of a mediator.

### Federal

#### **U.S. Department of the Interior**

##### **National Wildlife Refuges**

The U.S. Fish and Wildlife Service (FWS) claims federal reserved water rights for six national wildlife refuges in Montana. Water rights have been settled for the Benton Lake, Black Coulee, and Red Rock Lakes National Wildlife Refuges.

Negotiations continue on Bowdoin National Wildlife Refuge located near Malta. DNRC staff are monitoring the salinity levels in Beaver Creek, a tributary of the Milk River, to establish a baseline for the development of a water discharge plan for the refuge.

Negotiations with FWS on the two remaining units (listed below) will continue at a later date.

- Charles M. Russell/UL Bend National Wildlife Refuge
- The National Bison Range

### **U.S. Department of Agriculture**

#### **National Forests**

The commission has proposed that the U.S. Forest Service (USFS) withdraw all non-consumptive reserved water right claims in Montana. The negotiating teams have discussed a sequencing process that would require an applicant to acquire any federal authorization prior to obtaining a state water use permit. In addition to sequencing, USFS has suggested other supplemental alternatives, including the possibility of providing additional protection to water flows in “special areas.” Discussions and technical work are continuing between the commission and USFS. Several negotiating sessions are scheduled for this year.

#### **Livestock and Sheep Experiment Stations**

The U. S. Department of Agriculture (USDA) is preparing proposals for the Livestock and Sheep Experiment Stations.

### **Other Reserved Rights**

The Turtle Mountain Band of Chippewa owns numerous small allotments scattered throughout Montana. The commission has been contacted by the Tribe requesting negotiations. The State of Montana and the Tribe have requested the appointment of a federal negotiating team.